Articles

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King Arthur Confronts *TwIqy* Pleading

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Professor Arthur Miller has been my senior coauthor for nearly forty years and my guide for longer than that. I have learned much from him, and gained much more by association with him, than I could hope to repay. At most I can hope to pay tribute where tribute is richly deserved, however far short I may fall in the execution.

INTRODUCTION

Rule 25 of the 1912 Equity Rules stated that "it shall be sufficient that a bill in equity shall contain . . . a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence." Not mere conclusions, not evidence, but "ultimate facts." And, at that, not facts "constituting the cause of action."

The bare words of Rule 25 could mean something quite different to a twenty-first-century audience than they meant to a twentieth-century audience. But they may serve as a foil to the challenge framed by the Supreme Court in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2] for the committees that advise the Judicial Conference, and thence the Court, on the Court's discharge of its responsibilities under the Rules Enabling Act.[3] In those cases, the Court relied on an interpretation of Rule 8(a)(2) of the *Federal Rules of Civil Procedure*, which requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Any response to the challenge of drafting a pleading must begin by determining whether there is any reason to respond at all by recommending revisions of Rule 8(a)(2) or any other Rule of Civil Procedure. The Court did not suggest any reason to reconsider Rule 8(a)(2). But the deluge of academic commentary stimulated by the Court's opinions reflects deep concern that the Court has set lower courts on a path that will lead to improvident dismissals for failure to state a claim upon which relief can be granted. Professor Arthur R. Miller's article, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*,[4] is a masterful expression of these concerns.[5]

This Article is framed as an appreciation of Professor Miller's direct excoriation of *Twombly* and *Iqbal* and his straight-on assertion that something must be done to reset pleading standards, whether by the Court itself with the advice of its advisory committees or by

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1 550 U.S. 544 (2007).

2 129 S. Ct. 1937 (2009).

3 28 U.S.C. §§ 2072–2075 (2006).

4 60 DUKE L.J. 1 (2010).

5 One illustration of this article's influence can be found in Judge Hamilton's dissent in *McCauley v. City of Chicago*, No. 09-3561, 2011 WL 4975644, at *23 (7th Cir. Oct. 20, 2011).

Congress. His article is a massive demonstration of the qualities that put him at the front of civil procedure scholarship. By no means is it an exercise in nostalgia for the simpler world that greeted the *Federal Rules of Civil Procedure* on their birth in 1938.[6] Nor does he mince words. Professor Miller sees *Twombly* and *Iqbal*, together, as part of a steady march toward "efficient" disposition by sacrificing the merits to avoid trial and as a retreat from protecting individual rights in favor of concentrated wealth.[7] He evokes action by the rules committees to restore the power of civil procedure to protect individual rights and enforce broad public policies.[8]

If the Rules Advisory Committee embraces Professor Miller's concerns, the challenge will be to draft rules that restore, directly or indirectly, the opportunities that "notice pleading" afforded before May 21, 2007, the date of the *Twombly* decision.[9] It is also possible, on the other hand, that the Court got it right, and that lower courts have wisely developed the opportunities opened by the Court. Pleading standards have continued to evolve in practice in ways that may restore greater uniformity, at lower thresholds, than resulted in

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[6] "Much . . . has changed in the world of litigation . . . . The cultures of the law and of the legal profession are far different. . . . And litigation in the federal courts has become a world unimagined in 1938 . . . . The pretrial process has become so elaborate . . . that it often seems to have fallen into the hands of some systemic Sorcerer's Apprentice. . . . Sadly, in some respects today's civil litigation is neither civil nor litigation as previously known." Miller, *supra* note 4, at 7–9.

[7] The decisions "should be seen as the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. It also marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth." *Id.* at 10.

[8] The divide between plaintiffs and defendants on pleading standards "even may imperil the credibility and effectiveness of the rulemaking process as rulemakers try to chart a path from this point." *Id.* at 16. "[T]he Federal Rules—indeed, federal civil practice in general—stand at a critical crossroads. It is incumbent upon the courts and rulemakers to consider the full range of important questions and policy choices that have surfaced not just in *Twombly* and *Iqbal*, but as a result of the overarching trend toward pretrial disposition." *Id.* at 17. Professor Miller throws down the gauntlet in a clear challenge to the Advisory Committee: "Considering the Court's current ideological makeup and the continuing trend toward increasingly early case disposition, rulemaking by judicial mandate does not bode well for many of those policies that are furthered by private enforcement and the access principle. The members of the Advisory Committee therefore must determine whether they will reassert their role as independent architects of the Federal Rules, accept that an aspect of their responsibility now may be to codify the Court's Federal Rule decisions, or simply remain silent and defer to case development." *Id.* at 87.

[9] That is the approach of proposed legislation, the Notice Pleading Restoration Act described *infra* note 57.

the early years as hundreds of district court judges sought to work through the uncertainties opened by the Court's opinions. The steadying perspective of appellate judges can balance the initial enthusiasm of some trial judges for practices that free time for obviously substantial cases by sacrificing cases that seem insubstantial. If courts come to get it right, the challenge will be to decide whether there is any occasion to amend the rules at all, and if so whether Rule 8(a)(2) should be amended—perhaps along lines similar to Equity Rule 25—to better express the new approach. For that matter, it is possible that, constrained by unchanged rule language, the Court, as understood by the lower courts, did not go far enough. Drafting still more demanding pleading standards would be a drafting challenge of a different order.

No purpose would be served by adding to the countless summaries of the *Twombly* and *Iqbal* opinions that grace the law reviews and court reports. Anyone reading these comments is thoroughly familiar with them. Professor Miller's article provides a comprehensive account of the cases and commentary over the first three years and more following *Twombly*, and more than a year following *Iqbal*. What follows is a series of reflections on the responsibility of the rules committees to consider all major gradations of pleading standards and possible direct ties of discovery to pleading requirements. Committee work in all things is deliberate. Apart from the most obvious technical changes, it takes at least three years to move from an idea to an adopted amendment. More important or difficult topics take longer, often much longer. And even the starting point may be deferred when, as with pleading, practice continues to develop and painstaking empirical work is progressing. Illustrations are drawn from ongoing Advisory Committee work, with two cautions. The illustrations are only that, pictures drawn from a larger body of Committee materials. And none has been the subject of the intense Committee deliberations that will occur if—it is not certainly "when"—the Committee concludes the time has come to work on specific proposals. Nothing in what follows can be taken as even a hint of possible Committee recommendations.

The principal themes are easily summarized. The *Twombly* and *Iqbal* opinions reveal the Court's hope that something good may be achieved by increasing the opportunity to dismiss litigation at the pleading stage. The opinions do not give any precise guidance toward realizing the hope. Instead, they have encouraged lower courts to engage in a common-law process that, by fits and starts, is working

toward new practices. Litigants have presented many motions that speed the evolutionary process, but evolution continues. When some measure of stability is achieved, it will remain to be determined what to make of it all. That determination will not be easy. Counting the rate and numbers of dismissals is only a beginning. The hard part will be reaching judgments about the desirability of the new practices, if indeed the new practices become firmly established.

The most common belief—to many, the fear—is that actions that would not have been dismissed on the pleadings before *Twombly* and *Iqbal* will be dismissed in the era of new pleading practices. Is any increase undesirable? Is it possible that a still greater increase would be desirable? Judgment requires a means of valuing the loss of claims that would have succeeded if allowed to survive at the pleading stage, values that involve both individual interests and broader social interests in enforcing policies enshrined in substantive law. To many observers, judgment also requires a means of valuing the impositions on defendants who must litigate beyond the pleading stage, whether to win on the merits or to settle on terms shaped by the uncertainty and costs of continued litigation. Undertaking rules amendments requires a reasonably secure judgment that things have gone wrong. That may be some way off. If that judgment is reached, the next task is to translate it into rule provisions that move practice in a better direction. That may be the greatest challenge of all. The rules committees may be pardoned for proceeding with self-conscious deliberation.

I

CIVIL RULES COMMITTEE AGENDA BEFORE 2007

This account of the Civil Rules Advisory Committee's consideration of pleading practice begins a bit more than two decades ago. Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted were reconsidered as part of a project to revise summary judgment practice under Rule 56, a project that fell dormant for many years before it was revived to produce the rewritten rule that became effective on December 1, 2010. There was some early enthusiasm for a proposal that would abolish the 12(b)(6) motion and also the Rule 12(c) motion for judgment on the pleadings. The purpose was to "unif[y] pleadings motion practice with summary judgment practice." The motion could address the legal sufficiency of a claim, with or without a challenge to the sufficiency of the evidence to support a legally sufficient claim. The major difference

was that the nonmovant's opportunity for discovery before a ruling, an established feature of summary judgment, would be expressly confirmed for motions that challenge only the legal sufficiency of a claim.[10] This proposal was dropped from the Rule 56 project before the project was put aside for further work following rejection by the Judicial Conference.

By 1993, the focus shifted from the question whether to add further protections against dismissal for failure to state a claim. That was the year the Supreme Court decided *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.[11] The Court ruled that "heightened pleading" could not be required for claims that a municipal entity was liable for Fourth Amendment violations committed by its employees and was separately liable for failing to train its employees to avoid Fourth Amendment violations.[12] The Court reasoned that by specifying issues that must be pleaded with particularity in Rules 9(b) and (c), the rules impliedly exclude any other particularized pleading requirements.[13] At the close, the Court suggested that it might be that the Rules should be rewritten to subject claims against municipalities under 42 U.S.C. § 1983 "to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."[14]

The Civil Rules Advisory Committee immediately took up the invitation to consider specific pleading requirements.[15] Given the occasion, it should be no surprise that the Committee framed the question in those terms: should heightened pleading be required, either for specific categories of cases or in more general terms? By the time of the Advisory Committee meeting in the fall of 1993, it

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[10] *See* ADVISORY COMM. ON CIVIL RULES, AGENDA MATERIALS FOR THE FEBRUARY 13–14, 1987, MEETING, at 138–44 (1987) (on file with author) (setting out the Rule 12 proposal).

[11] 507 U.S. 163 (1993).

[12] *Id.* at 164.

[13] The opinion might seem inconsistent on this rationale, because it left open the possibility that "our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 166–67. The inconsistency could be explained away, however, by understanding this caveat to mean only that Rule 8(a)(2) would be satisfied by mere notice pleading but that the substantive imperative of official immunity supersedes ordinary pleading rules.

[14] *Id.* at 168.

[15] ADVISORY COMM. ON CIVIL RULES, MINUTES FROM THE MAY 3–5, 1993, MEETING, at 17–18 (1993).

framed these questions in terms that anticipated part of the debates that rage today.

The memorandum that framed the questions suggested that "the required level of pleading specificity varies widely among different types of litigation."[16] It found support both in academic commentary[17] and judicial observations.[18] It did not take a position on this phenomenon. It made note of the argument that "it would be virtually impossible for the rulemaking process to regularize the process by which heightened pleading requirements are enforced."[19] On the other hand, it observed that expanding the motion for a more definite statement might, indeed, regularize the process; yet, "[o]ne range of arguments surely will be that a seemingly neutral procedure will in fact be used to dispose of disfavored claims by artificially elevated pleading requirements."[20]

After the 1993 memorandum, pleading reappeared on the Advisory Committee agenda at irregular intervals. Some of the illustrative draft rules are included in the survey of potential amendments set out in Part IV. The last appearance before the *Twombly* decision came in September 2006. This proposal suggested a number of alternative ways to revise the Rule 12(e) motion for a more definite statement. Three variations would have added authority to order a more definite statement of a pleading—any pleading, not only "a pleading to which a responsive pleading is required"—"if a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f)"; "will facilitate management of the action [under Rule 16]"; or "will enable the parties and the court to conduct and manage discovery and to [present and] resolve dispositive motions."[21] A fourth variation was more direct: "[o]n motion or on its own, the court

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16 ADVISORY COMM. ON CIVIL RULES, AGENDA MATERIALS FOR THE OCTOBER 21–23, 1993, MEETING, at 196 (1993).

17 *Id.* (citing Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986)).

18 *Id.* (quoting Judge Keeton, who served as Chair of the Standing Committee on Rules of Practice and Procedure: "[S]pecificity requirements are not limited to cases decided under Rule 9(b) or under Admiralty Rules C(2) and E(2)(a). Rather, the 'degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context.'" Bos. & Me. Corp. v. Town of Hampton, 987 F.2d 855, 866 (1st Cir. 1993)).

19 *Id.* at 197.

20 *Id.* at 198.

21 ADVISORY COMM. ON CIVIL RULES, AGENDA MATERIALS FOR THE SEPTEMBER 7–8, 2006, MEETING, at 294–96 (2006).

may order amendment of a pleading to provide sufficient particularity to" achieve whichever of the three variations might be chosen.[22]

Two of the illustrations of possible rules amendments may be noted. Rule 8(a)(2) might be amended to require "a short and plain statement of the claim *in sufficient detail to* show~~ing~~ that the pleader is entitled to relief." What has become Rule 8(d)(1) might be amended to read: "Each allegation must be simple, concise, and direct. No technical form is required. *The pleading as a whole must be sufficient to support informed decision of a motion under Rules 12(b), (c), or (f).*"

Lawyers reacted favorably. Judges were concerned that Rule 12(e) would become the basis for reflexive, "roadblock" motions.[23] In 2005, the Advisory Committee summarized competing considerations in terms that seemed to anticipate *Twombly* and *Iqbal*:

> The wide variety of heightened pleading requirements that have emerged in practice provides the foundation for a response to this history. It may show that the collective wisdom of many judges, growing over time, is better than the abstract passion for minimized pleading. Whatever may have been desirable in 1938 or 1948[24] is no longer desirable. The burdens imposed by going to pretrial stages beyond pleading continue to grow. As the law keeps growing to regulate more and more human activities in increasingly complex ways, so grows the opportunity to bring lawsuits founded on theories that cannot withstand the light of full statement. Pleading must be restored as a protection against the procedures that help to prepare for trial or summary disposition.[25]

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[22] *Id.* at 297.

[23] The summary in the minutes provides greater detail:

> [T]he judges seemed to be reflecting experiences different from the experiences of the lawyers. The lawyers represented careful, thoughtful, desirable practice. They can understand the potential good uses of case-specific pleading orders as means to more efficient identification of the issues, control of discovery, and perhaps resolution by dispositive motion. The judges confront lawyers who do not practice to these standards, and fear misuses that will add to delay and impose burdens on the court that are not sufficiently alleviated by simply denying the ill-founded motions. The many tools available to shape discovery and to manage an action more generally may counsel that nothing be done. The idea still may deserve development, but great care will be required.

ADVISORY COMM. ON CIVIL RULES, MINUTES FROM THE SEPTEMBER 7–8, 2006, MEETING, at 24 (2006).

[24] The bill of particulars was replaced by the Rule 12(e) motion for a more definite statement in 1948.

[25] ADVISORY COMM. ON CIVIL RULES, AGENDA MATERIALS FOR THE OCTOBER 27–28, 2005, MEETING, at 390 (2005).

The Committee carried the Rule 12(e) project forward, but the *Twombly* and *Iqbal* opinions open questions that must be viewed from broader perspectives. Now the Committee must consider many alternatives, some competing and some mutually enforcing.

II
THE COURT SPEAKS

The two decades of Supreme Court pleading pronouncements before the *Twombly* opinion provided uncertain guidance. Two opinions stated clearly that outside Rule 9(b), Rule 8(a)(2) provides a uniform standard that prohibits heightened pleading.[26] At least three others, and perhaps four, seemed to apply standards more demanding than elemental "notice" pleading.[27]

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[26] Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

[27] Christopher v. Harbury, 536 U.S. 403, 416–18 (2002); Crawford-El v. Britton, 523 U.S. 574, 597–98 (1998); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983). The *Crawford-El* opinion is the most explicit. It mingled two concerns: pleading a claim that "requires proof of wrongful motive" against a public officer who may be able to invoke official immunity. *Crawford-El*, 523 U.S. at 597. By ordering the plaintiff to reply to the answer, or by ordering a more definite statement under Rule 12(e), "the court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. . . . This option exists even if the official chooses not to plead the affirmative defense of qualified immunity." *Id.* at 598.

In the *Associated General Contractors* case the Court assumed that the antitrust laws might be violated by an agreement among construction contractors to coerce others to do business with nonunion firms, weakening and restraining the trade of other firms. *Associated Gen. Contractors*, 459 U.S. at 527–28. The Court added a footnote that may be more interesting because the author was Justice Stevens, who dissented in *Twombly*:

> Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson*, 355 U.S. 41, 47–48 . . . too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Id. at 528 n.17 (ordering dismissal for want of antitrust standing).

The Court in *Dura Pharmaceuticals, Inc. v Broudo*, 544 U.S. 336, 346–48 (2005), ruled that a complaint for securities fraud "failed adequately to allege" proximate cause and economic loss. The Court invoked a passage from *Conley v. Gibson*, 355 U.S. 41, 47 (1957), that was quoted and preserved in the *Twombly* opinion: the "short and plain statement" required by Rule 8(a)(2) "must provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharm.*, 544 U.S. at 346. But the complaint failed because it alleged only that the plaintiff bought stock at a

Lower courts were similarly inconsistent. In 2004, Judge Posner wrote that the Federal Rules replaced fact pleading with notice pleading, forbidding any heightened pleading requirement that a prisoner plaintiff "plead enough facts to show that it would be worthwhile to put the defendants to the bother of answering the complaint . . . [despite] the frivolousness of most of that [prisoner] litigation."[28] Other opinions, on the other hand, clearly required exquisitely detailed pleading.[29]

Then came *Twombly*, followed two years later by *Iqbal*. The Court seemed concerned that the time had come to reorder the multiple approaches reflected in its own opinions and the welter of approaches taken in the lower courts. It is easy to explain away each case by pointing to the special reasons that could have led the Court to want to protect the defendants at the pleading stage. The concern in *Twombly* was that it is easy to allege a horizontal conspiracy among

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price inflated by the defendants' misrepresentations. *Id.* at 347–48. Paying an artificially inflated price is not, the Court thought, "a relevant economic loss." *Id.* at 347. The complaint did not provide "notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation[s]." *Id.* The opinion blends substantive securities-law concepts with pleading requirements in a way that defeats confident characterization, but it would be easy to conclude that it required a heightened level of "notice" in response to the perceived needs of a particular class of litigation.

[28] Thomson v. Washington, 362 F.3d 969, 970–71 (7th Cir. 2004).

[29] Two wrenching examples illustrate this. First, the court in *Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir. 2005), affirmed dismissal of a complaint alleging a substantive due process violation based on a state-created risk. A murder suspect killed the plaintiff's fifteen-year-old daughter after she agreed to appear as a witness against him. *Id.* at 30. The complaint set out facts to support the theory that the defendants created the risk: they persuaded the girl to be a witness, assured her she would be protected, compelled her to confront the defendant in open court, failed to put her in a witness-protection program although another child witness was placed in a program, and failed to react after repeated notices of repeated explicit threats made to the child. *Id.* The court assumed that a claim would be made if "the circumstances shock the conscience," *id.* at 36, but found the pleading inadequate, *id.* at 39. The most obvious explanation is that the court was intent on severely limiting the state-created risk theory. It seems likely that many other courts would have reached the same decision.

Second, the court in *Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005), affirmed dismissal of a complaint brought on behalf of a mentally challenged eight-year-old boy who was repeatedly sodomized and sexually molested by other residents of a state-run residential facility where the state had placed him after he fell victim to sexual abuse by his father. "Because of John's youth, limited cognitive abilities, and his emotional trauma from the attacks, he is unable to provide details of the events or identify how the Defendants' actions allowed the attacks to occur." *Id.* at 988. After rejecting dismissal on the basis of heightened-pleading requirements, the court affirmed dismissal for failure to satisfy the trial court's "reasonable orders to delineate Defendants and identify their respective acts or omissions." *Id.* at 989.

competitors or potential competitors, but it is difficult to prove conspiracy either as a matter of explicit agreement or as a matter of elusive concepts that seek to distinguish "conspiracy" from achieving the same behavior by sophisticated calculation of move and possible countermove in a concentrated market structure. The concern in *Iqbal* was that the ease of alleging intent to discriminate was supplemented by the manifest wish, reflected in official immunity doctrine, to protect high-ranking public officials against the burdens of litigation. But both in *Twombly* and in *Iqbal* the Court did not restrict its opinions to those concerns. Instead, it wrote in general terms about the meaning of Rule 8(a)(2).

The Court's explicit focus on the costs imposed by contemporary discovery practices demonstrates the broad reach of both opinions. The Court showed clear skepticism about the ability of trial court judges to contain these costs by carefully managing discovery in a process designed to elicit, at reasonable cost, information sufficient to support a determination whether to end the case on a dispositive motion or to advance to full-blown discovery. Repeated failure to curtail runaway discovery costs, even if only in a small fraction of cases at the top of the extensive discovery scale, suggested that the time had come to explore reliance on pleadings motions as an enhanced threshold for admission to the discovery process.

The opinions the Court wrote to express this concern are not models of clarity. Understandably, in construing present Rule 8(a)(2) the Court did not attempt to draft new rule text. Many terms might characterize the *Twombly* opinion in this dimension. Not all are flattering, but a sympathetic characterization is both possible and at least close to the mark. The Court's vantage point at the top of the federal court structure lends a perspective not always given to those laboring in the trenches. It is easy to become accustomed to the incredibly expensive discovery practiced in some cases, assuming it is warranted by a deliberate choice to depend on discovery, not "notice" pleadings, to determine what facts are available to support application of a legal theory that is valid if, indeed, facts can be found to support its application. The Court is not immersed in this practice on a daily basis. It is easier for it to ask whether something can be done to redress the balance, at least some of the time for some of the cases.

The *Twombly* opinion provides a rich smorgasbord of phrases that courts may seize upon to support any of a wide range of pleading regimes. They might require substantially heightened pleading across

the board, or nearly so.[30] Or they might apply different pleading standards to different categories of actions. Or, in the phrase from *Iqbal*, they might apply *ad hoc* pleading standards, even within any particular category of actions according to "judicial experience and common sense."[31]

It would be easy to emerge from studying the *Twombly* opinion uncertain, or even bewildered, as to what is intended. Uncertainty seems the appropriate sense of it. But it is the Court's own uncertainty. Hoping that something might be done through initial evaluations at the pleading stage to advance the Rule 1 goals of "just, speedy, and inexpensive determination," the Court does not know just what that something might be. Rather than attempt a firm answer, it has invited the lower courts to carry on, more openly and more freely than in the past, a common-law process of developing pleading standards. This uncertainty, perhaps mixed with some ambivalence, may be found in later opinions that seem to honor the pre-*Twombly* "no heightened pleading" admonitions.[32]

The lower courts have responded to the invitation. Initial reactions diverged markedly, as might be expected. Five years is not yet enough time to achieve stability, not even stability in settling on different approaches in different circuits. But there is reason to think that the process of sorting things out is proceeding at a sensible rate. Certainly the courts have, from the beginning, devoted great energy and care to the task.[33] And some, after only a few years, have

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30 The *Twombly* opinion said in a footnote that what then was the Form 9 complaint for negligence, now Form 11, suffices. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565 n.10 (2007). There was little choice; Rule 84 says that the forms suffice under these rules. But as noted in Part IV, the sufficiency of pleading negligence in an automobile accident does not control the sufficiency of pleading negligence in other contexts.

31 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

32 Pride of place is commonly given to *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), decided two weeks after *Twombly*, reversing on the certiorari papers the dismissal of a *pro se* prisoner's complaint. The Court invoked its own earlier statements that a *pro se* complaint is to be liberally construed and held to less stringent standards than formal pleadings drafted by lawyers. *Id.* at 2200.

In *Skinner v. Switzer*, 131 S. Ct. 1289 (2011), the Court cited the *Swierkeiwicz* decision, *see supra* note 26 and accompanying text, and went on, "Rule 8(a)(2) . . . generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument," *Skinner*, 131 S. Ct. at 1246.

33 Judge Newman's opinion in *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom. Iqbal*, 556 U.S. 662, is a remarkable illustration of resourceful, sympathetic, and understanding response within barely more than three weeks of the *Twombly* opinion. He found that the opinion, through "several, not entirely consistent signals," indicated an intent "to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since Conley v. Gibson." *Id.* at 155. The "conflicting signals

concluded that no more than modest changes have been made.[34] Of course disagreements of expression remain and often reflect real

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create some uncertainty as to the intended scope of the Court's decision." *Id.* at 157. "[T]he Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility' standard, which obliges a pleader to amplify a claim with some allegations in those contexts where such amplification is needed to render the claim plausible." *Id.* at 157–58.

[34] The Seventh Circuit has provided many good opinions. Four, and a dissent in a fifth, chosen almost at random, illustrate the point.

Vance v. Rumsfeld, 653 F.3d 591 (7th Cir. 2011), was, like *Iqbal*, an action against a cabinet member. The plaintiffs claimed that Secretary of Defense Rumsfeld was personally involved in and responsible for their unlawful imprisonment and torture in Iraq. *Id.* at 594. But unlike *Iqbal*, they did not need to allege a purpose to discriminate. *See id.* The court found adequately pleaded facts to support claims "that Secretary Rumsfeld acted deliberately in authorizing interrogation techniques that amount to torture," and also "deliberate indifference . . . in failing to act to stop the torture of these detainees despite actual knowledge of reports of detainee abuse." *Id.* at 600. The complaint spread over 79 pages and 387 paragraphs. *Id.* at 595. The rules "impose no special pleading requirements for *Bivens* claims, including those against former high-ranking government officials." *Id.* at 600. The court rejected such arguments for the defendant as that allegations of imprisonment in "extremely cold" cells lacked factual context, elaboration, or comparisons, invoking the simplicity of Forms 10-15 mandated as sufficient by Rule 84. *Id.* at 607.

In *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010), the court began by explaining its decision to grant permission for an interlocutory appeal. There was "a question of the meaning of a common law doctrine—namely the federal common law doctrine of pleading in complex cases." *Id.* at 626. "Pleading standards in federal litigation are in ferment after *Twombly* and *Iqbal*," justifying permission to appeal. *Id.* at 627. In *Iqbal*, the Court said that the plausibility requirement is not akin to a probability requirement but demands more than a sheer possibility. *Id.* at 629.

> This is a little unclear because plausibility, probability, and possibility overlap. . . . [W]hat is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as "preponderance of the evidence" connote.

Id.

Bausch v. Stryker Corp., 630 F.3d 546 (7th Cir. 2010), was a claim for injury caused by a hip replacement device manufactured in violation of federal law. In ruling that the original complaint should not have been dismissed for failure to state a claim, the court quoted an earlier opinion: "As a general rule . . . notice pleading remains the standard." *Id.* at 559 (quoting Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., 536 F.3d 663, 667 (7th Cir. 2008)). And another: "We give the plaintiff 'the benefit of imagination, so long as the hypotheses are consistent with the complaint.'" *Id.* (quoting Bissessur v. Indiana Univ. Bd. of Trs., 581 F.3d 599, 603 (7th Cir. 2009)). The plaintiff need not plead the precise defect or the specific federal regulatory requirements that were allegedly violated. *Id.* at 560. "[T]he victim of a genuinely defective product . . . may not be able to determine without discovery and further investigation whether the problem is a design problem or a manufacturing problem." *Id.* Making matters more difficult at the pleading stage, much of the critical information is confidential as a matter of federal law. *Id.* "An injured plaintiff cannot gain access to that information without discovery." *Id.*

Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010), was a divided decision. Dismissal of a complaint alleging race discrimination in denial of a home-equity loan was reversed. *Id.* at 407. Explaining *Twombly* and *Iqbal*, Judge Wood wrote for the majority,

> As we understand it, the Court is saying . . . that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.

Id. at 404. And the court's reliance on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), "indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet [the pleading] burden than it was before the Court's recent decisions." *Swanson*, 614 F.3d at 404. Judge Posner dissented, emphasizing the burdens of discovery, particularly when a plaintiff has little information to be discovered and can impose heavy discovery burdens on a defendant who has extensive information. *Id.* at 411. *Twombly* and *Iqbal* were intended to create a greater symmetry of litigation costs. *Id.* at 412. But "[i]f the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss." *Id.*

Judge Hamilton wrote the court's opinion in *Vance v. Rumsfeld*, described above, and a dissent in *McCauley v. City of Chicago*, No. 09-3561, 2011 WL 4975644 (7th Cir. Oct. 20, 2011). In *McCauley*, the plaintiff's decedent was killed by her former boyfriend. *Id.* at *1. The claim was that the City of Chicago violated her equal protection rights by failing to protect domestic violence victims. *Id.* at *6. The court saw the claim as a "policy-or-practice claim" of failing to have adequate policies in place. The court invoked *Twombly* and *Iqbal* to establish the need for some specific facts: "The degree of specificity required is not easily quantified . . . . The required level of factual specificity rises with the complexity of the claim." *Id.* at *4 (citations omitted). The claim here was both complex and "counterintuitive." *Id.* at *7. Allegations that the city "authorized, tolerated, and institutionalized the practices and ratified the illegal conduct," "with deliberate, callous, and conscious indifference," were mere "legal elements, . . . not factual allegations and as such contribute nothing to the plausibility analysis . . . ." *Id.* at *6. The remaining allegations failed to rise to the level needed to support what the court found to be required—"selective withdrawal of police protection." *Id.*

Judge Hamilton's dissent shared skepticism that the plaintiff could establish the required showing that the police department made a deliberate decision to withdraw protection for victims of domestic violence because of an intentional animus against women. *Id.* at *8. But, he said, the claim is legally viable. *Id.* According to Judge Hamilton, the case thus presented the problem of faithfully honoring all the commitments a lower court has in developing federal pleading doctrine. *Id.* at *10. The court must "do [its] best to apply the law as stated in *Iqbal*." *Id.*

> [But] it [is] also our responsibility to do our best to apply other Supreme Court decisions involving pleading standards . . . as well as the Federal Rules of Civil Procedure . . . and the form pleadings that are part of the Federal Rules . . . . *Iqbal* is in serious tension with these other decisions, rules, and forms, and the Court's opinion fails to grapple with or resolve that tension. I do not believe it is an exaggeration to say that these decisions, rules, and forms simply conflict with *Iqbal*.

Id. In other words, the Court's interpretation of Rule 9(b), allowing general allegations of intent, knowledge, and other conditions of mind, conflicts with the Rule.

differences in approach.[35] Differences existed before the Supreme Court spoke and will remain no matter how often and clearly the Court may speak again. For that matter, differences will persist even if the Civil Rules Advisory Committee attempts to regularize pleading standards, or the relationship between pleading and discovery, by amending the Civil Rules.

III
MEASURING THE EFFECTS

Several sophisticated empirical attempts have been made to assess the effects of *Twombly* and *Iqbal* by measuring the frequency and outcome of motions to dismiss on the pleadings. The broadest study was undertaken by Joe Cecil at the Federal Judicial Center at the request of the Civil Rules Advisory Committee.[36] This study also

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The full *Iqbal* opinion conflicts with other Supreme Court opinions. It conflicts with the form complaints. "Unless one can plausibly explain away the tension[s] . . . then *Iqbal* conflicts with the Rules Enabling Act . . . and the prescribed process for amending the Federal Rules . . . ." *Id.* at *12. Beyond these flaws, "the fact/conclusion dichotomy is highly subjective," "leading to judge-specific and case-specific differences in outcome that confuse everyone involved." *Id.* By invoking "'judicial experience and common sense,' [*Iqbal*] invites the highly subjective and inconsistent results that have been observed." *Id.* at *13. Applying *Twombly* and *Iqbal* could easily have led to dismissing the complaint in *Brown v. Board of Education*, 347 U.S. 483 (1954). Dismissal in this case ran afoul of the Court's no-heightened-pleading rulings, Rule 9(b), and the form complaints. "Perhaps the Supreme Court majority intended *Iqbal* to work such a revolution in federal civil practice, but if so, the Court failed to grapple with the conflicts and did not express any direct rejection of these other governing sources of law." *McCauley*, 2011 WL 4975644, at *17.

35 A perceptive and careful review, covering more than the first four years after *Twombly*, is provided by Andrea Kuperman, Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* (July 26, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_072610.pdf.

36 JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf [hereinafter CECIL ET AL., MOTIONS TO DISMISS]; JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf [hereinafter CECIL ET AL., UPDATE ON RESOLUTION]. The November report indicates that revisions will be made to account for data missed in the original work, but also finds "no reason to believe that inclusion of the missing orders will change the findings of our study of outcomes of motions." CECIL ET AL., UPDATE ON RESOLUTION, *supra*, at 1.

The FJC study is appraised in Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss* (Oct. 27, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904134. Dr. Cecil and Professor Hoffman discussed the issues raised by Professor Hoffman at the November 7–8, 2011, meeting of the Civil Rules Advisory Committee.

summarizes some of the other studies.[37] The FJC study counted Rule 12(b)(6) motions to dismiss filed in the first ninety days after an action was filed during two periods: October 2005 through June 2006, and October 2009 through June 2010.[38] Twenty-three federal districts were included, accounting for fifty-one percent of all federal civil cases filed during these periods.[39] Some types of cases were excluded.[40] Motions based on insufficient pleading of the facts were not distinguished from motions based on inadequacy of legal theory.[41] Nor was it possible to take account of possible changes in pleading practices to include more factual allegations.[42]

The FJC studies are too rich in detail to adequately summarize here. The broadest finding, made without adjustments, was that in all cases (excluding prisoner and *pro se* cases), the rate of filing a motion to dismiss went from 4.0% in 2005–2006 to 6.2% in 2009–2010.[43] This is characterized as a 2.2% difference; it also could be described as a 55.0% increase in the rate of filing. Different rates were found for different categories of cases.[44] Statistical adjustments complicated the picture but confirmed increases in the rate of making motions.[45]

Rulings on the motions came next. The broad findings were that in all cases counted, motions were denied in 34.1% of the cases in 2006, and 25.0% in 2010.[46] Some or all of the relief requested by the motion was granted in 65.9% of the 2006 cases and 75.0% of the 2010 cases, but there was a change in the frequency of granting with leave to amend.[47] From 2006 to 2010 grants with leave to amend increased from 20.9% to 35.3%, while grants without leave to amend fell from 45.0% to 39.7%.[48] These figures were then subjected to

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See ADVISORY COMM. ON CIVIL RULES, MINUTES FROM THE NOVEMBER 7–8, 2011, MEETING, at 473–77 (2011).

37 CECIL ET AL., MOTIONS TO DISMISS, *supra* note 36, at 1 n.4.

38 *Id.* at 5.

39 *Id.*

40 *Id.* at 6.

41 *See id.* at 5–6.

42 *See id.*

43 *Id.* at 8.

44 *Id.* at 8–9.

45 *Id.* at 21.

46 *Id.* at 14 tbl.4.

47 *Id.*

48 *Id.* The purpose of the November study was to determine what happens after a motion is granted with leave to amend. "Our conclusions remain the same." CECIL ET AL., UPDATE ON RESOLUTION, *supra* note 36, at 1.

statistical adjustments to account for differences between the two periods in the courts in which motions were filed (different courts have quite different grant rates), the types of cases, and the presence of an amended complaint (courts are more likely to grant without leave to amend if the complaint has already been amended). After adjustments, a statistically significant increase in the grant rate was found only for financial instrument cases.[49] "No statistically significant increase in the likelihood that motions would be granted was found for other types of cases."[50]

The central findings naturally lead many readers to conclude that more actions are being dismissed for failure to state a claim. What else could follow from an increase in the frequency of motions coupled with an unchanged rate of grants? Differences in the data bases used, however, leave the FJC researchers agnostic on that score. At the same time, the other studies they note suggest that in fact more cases are being dismissed for failure to state a claim in the aftermath of the *Twombly* and *Iqbal* decisions.

What may be made of this research and the many projects that are sure to follow?

First, it seems clear that in deciding whether to file an action, a plaintiff must recognize an increased probability of facing a motion to dismiss for failure to state a claim. That is likely to increase cost and delay. Some plaintiffs may abandon the enterprise for that reason alone without regard to any calculation about the prospects of prevailing on the motion after *Twombly* and *Iqbal*.

Second, it seems likely that more cases will be dismissed for failure to state a claim. Quite apart from empirical counting of motions and outcomes, increased dismissals seem likely unless lower courts completely reject any heightened pleading standards or—by some heroic calculation—potential plaintiffs manage to avoid filing any of the actions that would not have been dismissed under earlier notice pleading standards but would be dismissed now.

Third, as often observed, it is not possible to determine by docket studies how many plaintiffs are deterred from filing actions by counting the outcomes in cases that are filed. It seems safe to assume that one consequence of heightened pleading is that, with or without more careful prefiling investigation and preparation, some plaintiffs abandon litigation before it is even commenced. Survey research

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[49] CECIL ET AL., MOTIONS TO DISMISS, *supra* note 36, at 21.

[50] *Id.* at 19.

seeking subjective experience may provide some insight on this possibility, but those who are displeased with the results will complain that the results are no more than an accumulation of anecdotes told by interested participants.

Fourth, there is no compelling indication that plaintiffs have become victims of wholesale pleading slaughter.

Fifth, measuring long-term effects will require long-term patience. It will be difficult to determine the point at which lower courts have achieved as much convergence on stable pleading standards as will occur without further outside influences. Lawyer practices are likely to stabilize only after that, as plaintiffs adjust the level of prefiling investigation and the amount of detail packed into complaints and defendants adjust the frequency of challenges to complaints. Many lawyers practiced heightened pleading long before *Twombly* and *Iqbal*; as more lawyers take up some measure of heightened pleading, and learn to sort cases better before filing, the measurable events will shift—so will the events that survey research seeks. And changes in the surrounding institutional framework will make measurement still more difficult. Overall case loads, changes in the mix of actions, gradual turnover in the ranks of federal judges, variations in pleading standards and practice influenced by local state-court practices, and countless other factors will generate some static.

Alas, accepting all of the studies and whatever conclusions they may support does not much advance the inquiry. It is important, indeed very important, to do such work as the FJC has done and as others are doing. But counting outcomes does not evaluate outcomes. The Supreme Court seems to believe that it may be a good thing to dismiss at the pleading stage more actions than were being dismissed. If the Court is right, it is a good thing to dismiss more actions and to discourage filing actions that should be dismissed. And how do we measure that? If the selection process is not perfect, how could it be? How do we balance the increased dismissal of claims that do not deserve dismissal against the increased dismissal of claims that do deserve dismissal?

It may seem obvious, but the first step is to decide on the criterion for deserved dismissal. Because pleading is a procedural matter, it is fair to accept substantive law as a given.[51] It might be argued that

[51] There is room to suspect that occasionally a dismissal on the pleadings reflects a fear that, absent dismissal, a claim will succeed on the merits of law that is distasteful to the court. That does not seem a valid purpose for any procedural device.

dismissal is desirable whenever the claim would lose on the merits of established law in a perfect procedural system. If that protects against an unwarranted victory on the merits in our imperfect procedural system, so much the better. That measure seems somehow wrong. What is a procedural imperfection depends on the values of the beholder. A jury's ability to decide in defiance of the law is a common illustration that may account for the occasional muttered admonitions that enhanced pleading standards may violate the Seventh Amendment.[52] For want of anything more complex, then, let us accept success on the merits in our actual court system as the measure. Justice is denied by dismissal of the complaint in an action that, if pursued to judgment on the merits, would result in judgment for the plaintiff.

One side of the balance, then, is the cost of dismissing a claim that, if allowed past the pleading threshold, would succeed on the merits. Defeat of a right to recover is easily seen as denial of a right, and rights must be taken seriously. But it would be extravagant to argue that a heightened pleading standard must be rejected if it results in the mistaken dismissal of even a single valid claim—a right—no matter how great the marginal success in dismissing invalid claims.

Perhaps the importance of defeating meritless claims at the threshold deserves some elaboration. Serious burdens are imposed on a defendant by the simple act of commencing an action. Ordinarily we do not compensate the successful defendant even for the out-of-pocket costs, much less the distraction from ordinary affairs and the emotional upheaval. These costs have grown as discovery has grown. The Court's concern with discovery costs is not idle. These costs should not be disregarded on the simple theory that generally defendants are business enterprises, insured, or individually wealthy enough to make suing them worthwhile. Even government defendants deserve concern, despite their ability to spread the costs of pursuing justice to the citizens at large. Not all plaintiffs are wronged innocents, nor are all defendants wrongdoers.

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[52] A nice illustration is provided by Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 403 (2011): *Twombly* and *Iqbal* "are an implicit attack on the jury trial and, in turn, on our democracy." "[T]he cases put the Seventh Amendment right to jury trial . . . in jeopardy." *Id.* at 405.

A much more detailed argument is provided by Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

These arguments point toward evaluating the ratio between valid and invalid claims in the bundle of increased dismissals that result from elevated pleading standards. If many invalid claims are dismissed at the cost of dismissing no more than a few valid claims, higher pleading standards may well be desirable. But the trick is to guess at the ratio, and guesses are likely the best we can do. Empirical evaluation of even a few thousand cases by this measure, chosen in an attempt to match across courts and categories of cases, before and after *Twombly* and *Iqbal*, seems impossible. Even recruiting neutral and sufficiently wise evaluators, and cross-checking their evaluations, could be an insurmountable challenge. Guessing is about as good as can be hoped for, and dispassionate guessing will be hard to come by.

If empirical evaluation indeed falls short, inquiry may turn to features of pleading standards that may invite questionable dismissals. The *Twombly* and *Iqbal* opinions provide tempting targets. "Plausibility" lies in the eye of the beholder. Mere possibility is not enough. But the inference of liability need not be more probable than all others, nor indeed as probable as the most probable competing inference.[53] And, at least according to the Court in *Twombly*, there is no need to show a probability that the plaintiff can actually prove well-pleaded facts.[54] The Court in *Iqbal*, on the other hand, attributes to *Twombly* a test requiring "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

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[53] A different rule is applied in cases governed by the Private Securities Litigation Reform Act, which requires that a claim of securities fraud "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (2006). The Court has ruled that because "[t]he strength of an inference cannot be decided in a vacuum," "[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323, 324 (2007). *Tellabs* was decided one month after *Twombly*.

[54] Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and "that a recovery is very remote and unlikely."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

Ashcroft v. Iqbal repeats the rule that all well-pleaded facts must be accepted as true, 129 S. Ct. 1937, 1949 (2009), but the malleability of the "well-pleaded" test leaves manifest opportunities to disregard asserted "facts" as mere "conclusions."

misconduct alleged."[55] These words should be read to mean only that the judge can find that a reasonable inference might be drawn, not that the judge must actually find the inference "reasonable" in some higher sense. But what sense is to be made of all this and the many other opaque statements? The line between legal conclusions and factual allegations also is not as clear as the Court may have it. The bare allegation of negligence in Form 11 suffices, at least for now, but it expresses a legal conclusion based on applying a standard of care to unpleaded facts. Reliance on "judicial experience and common sense" strikes many as an invitation to indulge the predispositions of individual judges. And if not that, at least too easy an excuse for clearing the docket of suspect cases to free judicial capacities for other cases that, somehow, seem more deserving.

Another concern, frequently voiced, is that detailed pleading of fact elements cannot be demanded when the defendant controls access to the information needed to state the facts. This concern with "asymmetric information" cases is reflected in Rule 11(b)(3), which allows pleading of factual contentions that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." It seems untoward to dismiss without allowing some opportunity for discovery when the defendant alone knows facts crucial to the claim.[56]

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[55] *Iqbal*, 129 S. Ct. at 1949.

[56] But an opinion in the Sixth Circuit reads *Iqbal* as compelling this result. New Albany Tractor, Inc. v. Louisville Tractor, Inc., 650 F.3d 1046 (6th Cir. 2011). The court affirmed dismissal of a price-discrimination complaint for failure to plead facts that would support an "indirect-purchaser" claim that the defendant manufacturer controlled the prices charged by its exclusive distributor, the plaintiff's sole source of supply. *Id.* at 1048. The court recognized that the defendants "are apparently the only entities with the information" required. *Id.* at 1050. "Before *Twombly* and *Iqbal*, courts would probably have allowed this case to proceed so that plaintiff could conduct discovery in order to gather the pricing information that is solely retained within the accounting system of" the defendants. *Id.* at 1051.

> [But] the language of *Iqbal* specifically directs that *no* discovery may be conducted in cases such as this, even when the information needed . . . is solely within the purview of the defendant or a third party, as it is here. . . . By foreclosing discovery . . . the combined effect of *Twombly* and *Iqbal* require plaintiff to have greater knowledge now of factual details in order to draft a "plausible complaint."

Id. The court cited Professor Miller's article, perhaps showing the risk that protests about potential misreadings may become self-fulfilling. *Id.* At any rate, the court made too much of this sentence in *Iqbal*: "Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1954). This sentence appears at the end of a segment that emphasizes the need to implement the protections against litigation afforded by official immunity. *Iqbal*, 129 S.

How these concerns play out in practice remains the central question. Feckless dismissals are possible. Sophisticated and restrained application of higher pleading standards also is possible. Assessment of the outcome is likely to remain impressionistic, and to be available only after still some years more of lower court developments.

IV
THE RULEMAKING CHALLENGE

Put aside the challenge of measuring the actual impact of *Twombly* and *Iqbal*, now or in the future, in manifold different categories of cases. And put aside the challenge of assessing the impact, now or in the future, whether good, bad, or neutral. Different challenges confront the rulemaking process if it is concluded that the changes are good, bad because they cause too many dismissals, bad because they do not yet achieve enough dismissals, or neutral because in the end the lower courts batter the law back to where it pretty much was before the Court spoke.

Take first what may be the simplest conclusion, that the lower courts, working the magic of the common-law process, achieve a good or neutral balance across the board. Is there any point in attempting to capture the new standards in revised Rule language? Often it is valuable to capture established "best practices" in rule language, making them uniform. Ideal rule language would clearly express the present best practice, but leave room for cautious continuing evolution as circumstances continue to change. The drafting is not always easy. Possible illustrations are provided below.

It seems fair to assert that by far the largest portion of current academic commentary believes that pleading standards have been raised too high, at least some of the time for some types of cases. Certainly Professor Miller holds this fear. If that is right, the drafting task will be to find language that cuts back, either to some lower pleading level that remains above the pre-*Twombly* practice or to the practice that existed when *Twombly* was decided. Some of the bills

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Ct. at 1953–54. Repeating the Court's skepticism about the ability of trial judges to supervise carefully focused discovery, the Court said this in the preceding sentence: "[W]e are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties." *Id.* at 1954. The admonition against discovery should be limited to this context. For that matter, there is a difference between not being "entitled" to discovery and having access to discovery in the court's discretion.

aimed at superseding the Court's new venture into pleading standards expressly attempted to restore pleading practices to the state of the world on the day before *Twombly* was decided.[57] At least two difficulties must be surmounted in taking this approach. The first is that pleading standards varied both within the Supreme Court's own opinions and in lower court application. All that could be restored would be an attitude and, perhaps, a process of continuing evolution of the sort that actually led to *Twombly* and *Iqbal*. The second is similar. Lower courts interpreting a rule crafted to restore the pre-*Twombly* world would understand that the Supreme Court would provide the authoritative interpretation of the new rule. If the Court had adopted the new rule in the regular course of the Enabling Act, bowing to a considered recommendation that pleading standards had been raised too high, its interpretation would no doubt choose words different from those used in *Twombly* and *Iqbal*. But the Court could easily choose from the more demanding precedents, diminishing the new rule's effect. And if the new rule was adopted by direct congressional intervention, the Court might interpret it more grudgingly still.

Responses to the concern that pleading standards have been raised too high can be made indirectly, without revising any of the pleading rules. The most obvious alternatives would address the problem of asymmetrical information by providing some form of discovery in aid of pleading. Possible models are described below.

As yet there are few suggestions that lower courts have not gone as far as should be in raising pleading standards, whether as measured by the Court's wishes in *Twombly* and *Iqbal* or as measured by a more pressing need for reform than the Court recognized. But it is important to hold open all possible diagnoses of developing practice. Any attempt to raise pleading standards would stir vigorous resistance. The resistance would be in large part political in a true sense, advancing the public and private needs to ensure effective enforcement of the social and regulatory policies embodied in the

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[57] An example is the Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. § 3(a) (2010): "Except as expressly provided by an Act of Congress enacted before, on, or after the date of enactment of this Act . . . or by an amendment to the Federal Rules of Civil Procedure effective on or after that date, the law governing a dismissal, striking, or judgment described under subsection (b) shall be in accordance with the Federal Rules of Civil Procedure as interpreted by the Supreme Court of the United States in decisions issued before May 20, 2007." Subsection (b) described "dismissal or striking of all or any part of a pleading containing a claim for failure to state a claim, indefiniteness, or insufficiency, or a judgment on the pleadings."

laws that might be under-enforced. Careful drafting would do little to appease the resistance—if anything, clearly heightened standards could augment resistance. The drafting options could focus on Rule 8, seeking generally higher standards but perhaps allowing a few exceptions for categories of claims to be governed by more relaxed standards. Or the particular pleading requirements of Rule 9(b) might be expanded, either by adding to the categories listed in Rule 9(b) or by adopting a new multipart rule listing a lengthy catalogue of claims (and perhaps defenses). Singling out particular substantive categories for heightened pleading would require detailed and sensitive substantive knowledge. And arguments would be made that distinctions among claims are inappropriate, either as a general matter of "transsubstantivity" or as a departure from the command that Enabling Act "rules shall not abridge, enlarge or modify any substantive right."[58]

Before turning to a sample of drafting approaches, the example of Form 11 bears repeating. Form 11—Form 9 before the Style Project—is a complaint for negligence. The operative parts are simple: "on *date*, at *place*, the defendant negligently *drove a motor vehicle* against the plaintiff. As a result, the plaintiff was physically injured . . . ." The acts constituting negligence are nowhere described. Causation is pleaded casually: "as a result." A footnote in the *Twombly* opinion seems to find this form sufficient, observing that "[a] defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer . . . ."[59] The cogency of Form 11 rests not only on simplicity. Familiarity is also important. Motor vehicle accidents are frequently litigated. The parties know exactly how to go about preparing the case. They can focus discovery with little difficulty, and if they do not the court should have little difficulty doing it for them.

But what if a Form 11 complaint involves a more complicated legal claim? What if the accident occurs in a no-fault state: should the plaintiff be required to plead facts that take the plaintiff out of the no-fault regime and into negligence liability? Or what if the claim is against the vehicle's manufacturer: does it suffice to allege generally that the design was unreasonably unsafe (negligent)? Suppose the claim is that the manufacturer had sufficient notice of similar events to create a reasonable-care duty to launch a recall campaign? Or,

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[58] 28 U.S.C. § 2072(b) (2006).

[59] *Twombly*, 550 U.S. at 565 n.10.

shifting arenas, the claim is for negligent misrepresentations: could it suffice to allege only that at a specified time and place the defendant made negligent misrepresentations that the plaintiff relied upon to his injury? Or, to take a truly bold claim, how much need be alleged to go forward with a claim that the SEC was negligent in failing to uncover and stop a massive Ponzi scheme?[60] The idea that a few words in a pleading rule can cover all negligence claims with precision, dispensing with any need for elaboration in application, is doomed to fail. Multiplying this simple example across the full range of claims that may be brought to a federal court shows the need for flexible generality in the pleading rules. At some point, the rules will have to rely on wise application in response to specific cases, whatever the risks of invoking "judicial experience and common sense."

What follows is, pretty much without change, material that was included in the agenda materials for the April 4–5, 2011, meeting of the Civil Rules Advisory Committee.[61] The aim was to list some of the more obvious alternatives, whether broad avenues or narrow paths. The rule language used to illustrate some of the alternatives is only that—illustration that gives a clearer focus for inquiry, not carefully refined drafting.

The controlling caution must be repeated. None of these sketches reflects Committee deliberation, much less choice. They are heuristic in purpose, prepared to remind the Committee of choices that may be plausible, however far below the threshold of probable.

A. Pleading: Claim

An obvious place to begin is with Rule 8(a)(2). Even if some need appears to propose rule amendments, Rule 8 must be approached carefully. No matter what words might be chosen, the message would be ambiguous in ways that a committee note could not cure. Even if it were announced that the new language was intended to enshrine exactly the meaning of the *Twombly* and *Iqbal* opinions as elaborated by the lower courts, disputes would remain as to just what that meaning might be. If instead the purpose were to redirect in some way the paths taken by the lower courts, greater uncertainty—and

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60 This was the claim in *Molchatsky v. United States*, 778 F. Supp. 2d 421 (S.D.N.Y. 2011), *appeal docketed*, No. 11-2510 (2d Cir. June 21, 2011).

61 ADVISORY COMM. ON CIVIL RULES, AGENDA MATERIALS FOR THE APRIL 4–5, 2011, MEETING, at 173–80 (2011).

likely some real confusion—would follow. The manifest vulnerabilities of almost any Rule 8 proposal would support cogent protests by any group that feared adverse effects, and there might be many such groups. Still, Rule 8 must hold a high place on any agenda for addressing pleading standards.

Restore What Never Was: Some of the reactions to the *Twombly* decision seem to ask for restoration of the dictum in *Conley v. Gibson* that a complaint may be dismissed for failure to state claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." The plea for restoration in turn seems to ask that these words be taken literally. Most courts, at least, did not take the literal meaning. But Rule 8 might be redrafted in an attempt to restore a standard that never was: "a short and plain statement *giving notice* of the claim."

Restore What Was: A more realistic approach might attempt to restore pleading practice as it was on May 20, 2007, the day before the *Twombly* decision. This approach is more realistic only if it is accepted that there can be no precise definition of the practice in place at the time *Twombly* was decided. The idea would be to "go back to doing whatever it was you were doing, and continue to develop pleading practice without regard to anything in the *Twombly* or *Iqbal* decisions that might point you in a different direction." Even then it is difficult to believe that lower courts, recalling the *Twombly* and *Iqbal* opinions, could in fact recreate whatever they would have done had those cases never gone to the Supreme Court. But the attempt could be made. Two simple drafting possibilities are:

> "a short and plain statement of the claim, showing that the pleader ~~is~~ *may be* entitled to relief."
>
> "a short and plain statement of the claim—regardless of its nonconclusory plausibility—showing . . . ." Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 859 n.135 (2010).

A less reverent approach might be to republish present Rule 8(a)(2), with a committee note disavowing plausibility, context, judicial experience, and common sense. Explaining that it was messy, all those things counted, but it doesn't do to say so.

"*Notice plus*": The ABA Section of Litigation paper, "Civil Procedure in the 21st Century: Some Proposals" (April 24, 2010), proposes this as a mid-ground between their perception of *Twombly-Iqbal* standards and the notice pleading practice that prevailed on May 20, 2007:

> "A complaint shall allege facts based on knowledge or on information and belief that, along with reasonable inferences from those factual allegations, taken as true, set forth the elements necessary to sustain recovery."

Twombly–Iqbal *in Rule Speak*: Another approach would reflect basic agreement that the time had come to raise pleading standards to some extent—that the Court was right to make the attempt and also right to express the new approach in capacious language leaving the way open for lower court improvisation on the way to hammering out new standards through a common-law process. Although the opinions are written as opinions, not in an attempt to mimic rule language, some of the key words could be absorbed into Rule 8. These are among the possibilities:

> "a short and plain statement showing a plausible claim for relief"
>
> "a short and plain statement of facts and context showing the pleader is entitled to relief"
>
> "a statement of non-conclusional facts, direct or inferential, showing the pleader is entitled to relief"
>
> "a short and plain non-conclusory statement showing the pleader is entitled to relief"
>
> "a short and plain statement of a transaction or occurrence showing . . ."[62]
>
> "a short and plain statement of acts or events showing . . . "
>
> "a short and plain non-conclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought"[63]
>
> "a short and plain statement, made with particularity, of all material facts known to the pleading party that support the claim creating a reasonable inference that the pleader is plausibly entitled to relief," defining "material fact" as "one that is necessary to the claim and without which it could not be supported."[64]

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62 An early draft of Rule 8(a)(2) required a "statement of the acts and occurrences upon which the plaintiff bases his claim or claims for relief." Without "showing that the pleader is entitled to relief," this would be quite relaxed.

63 This is the proposal of the New York State Bar Association Special Committee on Pleading Standards in Federal Litigation. Letter from Samuel F. Abernethy, Esq., to The Honorable Mark R. Kravitz (July 13, 2010) (on file with author). Bringing "notice" into rule text is evocative, perhaps too evocative—it may imply a more general relaxation of pleading standards than actually existed before *Twombly* and *Iqbal*.

64 This is the proposal of Lawyers for Civil Justice, DRI, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.

More than Twombly–Iqbal:

> "The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief."[65]

Variations on Facts: Although the label is likely to prove controversial, Rule 8 could be pushed in the direction of something that could be called "fact pleading." The second of the three variations shown here approaches Code pleading; the first and third are designed to make it easier to disclaim any intent to revive indeterminate distinctions between "fact," "ultimate fact," and "evidence."

> "a short and plain statement of facts showing that the pleader is entitled to relief"
>
> "a short and plain statement of facts constituting the claim"
>
> "a short and plain statement of the claim, including facts showing that the pleader is entitled to relief"

Elements Pleading: Occasionally it is suggested that a pleader should be required to plead the elements of the claim: "a short and plain statement of the elements of the claim."

Prefiling Pleading: Alan Morrison's Duke Conference paper proposes an approach to situations in which the defendant has control of fact information required to state a claim.[66] Iqbal as would-be plaintiff, for example, could submit a letter or draft complaint to the defendants alleging that they ordered the challenged practices. If the defendants do not supply information in their control showing how the policies were established, they would be barred from challenging the complaint for failure to allege specifically facts connecting them to the orders. A mere blanket denial would not do, because there is likely to be a paper or e-mail trail. But if the defendants present

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[65] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (IAALS), 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES, 3 (2009) (Rule 2.1).

[66] *See* Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993 (2012). An earlier version of this article was presented at the 2010 Conference on Civil Litigation, Duke Law School, May 10–11, 2010.

evidence countering the claims, then the plaintiff must present "some basis . . . to avoid dismissal, rather like a mini summary judgment."

Reverse Pleading Burdens: Professor Miller suggests that if the plaintiff alleges the inaccessibility of critical information and "articulates a reasonable basis for the information's existence and the defendant's control over it . . . it might be reasonable to reverse the pleading burden and require the defendant to make the needed material available to the plaintiff along with whatever explanation it thinks appropriate."[67] The court could allow further discovery.[68]

Appellate Review: Professor Miller asks whether the "subjective appraisals" that inhere in "judicial experience and common sense" will lead to diluted appellate review.[69] Need the rules be amended to ensure continued de novo review of dismissals for failure to state a claim?

B. Rule 9(b)

From time to time thought has been given to adopting "heightened pleading" standards for specific kinds of claims, expanding the Rule 9(b) requirement that "fraud or mistake" be stated "with particularity." (Rule 9(c) also requires that a party denying that "a condition precedent has occurred or been performed . . . must do so with particularity.") One reason to hesitate has been concern that picking out specific claims might seem to imply substantive choices. Requiring greater fact information to allow a claim past the Rule 12(b)(6) threshold into the heavenly fields of discovery might seem to reflect a judgment about the relative desirability of enforcing that kind of claim. Although this concern must be taken seriously, there are powerful arguments that the purpose is as much procedural as the purpose of original Rule 9(b). (The original procedural purpose of Rule 9(b) may not be entirely clear, but any obscurity may bolster the argument that some blend of real-world procedural concern with substantive concerns is proper under the Enabling Act.)

Greater difficulty might arise in deciding just which claims to embrace in heightened pleading standards. Broad informal consultation might establish a tentative list. Actual choices for development might be supported by miniconferences or a general

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67 Miller, *supra* note 4, at 110.

68 *Id.*

69 *Id.* at 34–36.

request for public comment before any specific rule or set of rules is proposed.

Implementation by drafting would be influenced by the direction taken. If the revised rule simply expanded the categories of claims that must be stated "with particularity," the main challenge would be finding a way to identify the claims. Would it suffice to list "antitrust" claims, or should a more specific list of statutes be adopted? Some categories might be relatively easy to specify—civil RICO would be an example. But what of "environmental" claims—statutory, common-law (e.g., nuisance), or perhaps administrative? "Institutional reform"? Even the familiar example of claims likely to encounter an immunity defense could prove tricky; qualified or absolute official immunity to federal-law claims might be clear enough, but what of parallel immunities to state-law claims? Sovereign immunity, domestic or foreign? More exotic immunities?

Finally, a quite different Rule 9(b) question may be found in the *Iqbal* opinion. Rule 9(b) provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The Court rejected the argument that this provision makes adequate a bare allegation of "intent." "'[G]enerally' is a relative term. . . . It does not give . . . license to evade the less rigid—though still operative—strictures of Rule 8."[70] The task of pleading greater supporting detail for an allegation of intent is daunting, and is encountered frequently. Discrimination claims provide a common example. This question may deserve close attention.[71]

C. Reverse Rule 9(b): Special Relaxed Pleading Rules

Rather than expand the categories of claims that must be pleaded with particularity, whether in Rule 9(b) or in new rules, a reverse approach might be taken. Pleading standards could be raised for most claims, retaining relaxed notice pleading for specified claims. Individual discrimination (at least in employment: what of "class-of-one" equal protection claims?), intent to discriminate, "civil rights," claims based on facts inferred from circumstance, and others could be listed. One problem will be finding categories that can be kept within

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[70] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).

[71] Judge Hamilton's dissent in *McCauley v. City of Chicago*, No. 09-3561, 2011 WL 4975644, at *10 (7th Cir. Oct. 20, 2011), is more direct: "*Iqbal's* reasoning and holding conflict with Rule 9(b) . . . ." "The Court's statement about Rule 9(b) that '"generally" is a relative term' does not solve the problem or give practical guidance to district courts." *Id.* at *11.

meaningful bounds—"civil rights" is a pretty loose concept. It would be difficult to draft in terms that focus directly on information asymmetry, on "favored" claims, or "real people" claims. It would be possible to adopt an express *pro se* rule—but that might tempt lawyers to suggest a limited advising role at the beginning, to be followed by explicit representation later on. And past discussions have generally concluded that it is better to hold *pro se* parties to some semblance of the general pleading rules, perhaps with help from local forms and often with help from sympathetic judges.

D. Official Immunity

The recurring problem of official immunity pleading is difficult to address by focusing on the complaint. Perhaps the most feasible approach would be to require pleading with particularity whenever an individual-capacity claim is brought against a "public officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on a public employer's behalf."

An alternative approach would call for a reply, in the practice made famous by the Fifth Circuit. The rule might be framed as a Rule 9(b)(2), or as a Rule 7(a)(8), or something still different. The major difficulty with the Rule 7(a)(8) approach might be that plaintiffs would often overlook it. But it would be easy to draft if the reply is optional: "(8) a reply to an official immunity defense." If the reply is mandatory, there would be a cross-reference in Rule 7(a)(7), and a new Rule 9(b)(2): "(2) *Reply to [Official] Immunity Defense*. If a defense of [official] immunity is made [to a claim], the claimant must respond by a reply that states with particularity the circumstances that defeat immunity." "Official" is placed in brackets to indicate one of the drafting dilemmas—what sorts of immunity should be covered? Should the rule be framed explicitly in terms of an individual-capacity claim against a public officer or employee, etc.? "Official" itself would lead to such questions as Eleventh Amendment "immunity," claims against foreign sovereigns, and various immunities under state law. Without "official," all sorts of questions would arise: workers' compensation immunity? Charitable immunity, if it exists anywhere? Family immunities, if they exist anywhere? Even such things as immunity from attachment or the like?

E. Rule 12(d)

Rule 12(d) might serve better than Rule 56 as the location for a rule allowing a party opposing a claim to make what in effect is a preliminary motion for summary judgment. The motion would rely on matters outside the pleadings to challenge facts poorly pleaded, facts omitted, and perhaps facts "well pleaded." The pleader would have an opportunity for discovery similar to that provided by Rule 56 before responding to the motion. A rough draft:

> (D) PRELIMINARY SUMMARY JUDGMENT. A party [opposing a claim] may combine a motion under Rule 12(b)(6) or 12(c) with a preliminary motion for summary judgment under Rule 56. The movant may show there is no genuine dispute as to material facts that are required to support the claim or that defeat the claim. The court must allow the non-movant a reasonable opportunity for discovery on the facts asserted by the movant before ruling on the motion.

(It would be possible to carry forward some version of present Rule 12(d), which gives the court the choice between treating the pleadings motion as one for summary judgment by undertaking to consider the "matters outside the pleading." Or discretion to refuse to allow a premature Rule 56 motion could be expressed directly. The advantage of treating it as a Rule 56 motion is to pick up the full Rule 56 procedure from the beginning. Less elliptical drafting also may be desirable, but might encounter the reluctance to refer directly to the Rule 56 moving burdens that shaped new Rule 56.)

F. Rule 12(e)

We might consider reviving earlier Rule 12(e) proposals. The rule could focus on directing a more definite statement for the purpose of facilitating pretrial management, including initially limited discovery to support more precise pleading. Professor Miller describes this as a "Motion to Particularize a Claim for Relief," allowing a plaintiff to anticipate a motion to dismiss by moving for "plausibility discovery."[72]

G. Rule 12(b): Tied to Discovery

A great part of the dismay engendered by the *Twombly* and *Iqbal* decisions arises from concerns about "information asymmetry." The concerns tend to focus on categories of claims—product liability,

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[72] Miller, *supra* note 4, at 112–14.

some forms of employment discrimination, conspiracy, and so on. Plaintiffs, it is argued, typically lack access to information controlled by defendants and necessary to satisfy higher pleading standards. The need to support adequate pleading by discovery to elicit information controlled by the defendant might be built into Rule 12. The provision could focus only on 12(b)(6). Discovery may be needed to respond to other 12(b) motions, but it may be better to leave that to present practice. Discovery also may be needed to respond to a motion under Rule 12(c) or (f). The idea would be to allow—probably not require—the court to permit discovery for the purpose of improving the pleading before ruling on the motion.

Placing this approach in Rule 12 will prove awkward. The enumeration of Rule 12(b) motions as (1) through (7) is more a list than a sequence of paragraphs. The best approach might be to add a new subdivision after Rule 12(f)—subdivisions (g) and (h) do not have the same sacred identification as 12(b)(6) or even 12(c), and subdivision (i) was created in 2007 by the Style Project. So a new Rule 12(g) might look something like this:

> "(g) *Discovery in Aid of Pleading.* Before ruling on a motion under Rule 12(b), (c), or (f), the court may allow discovery [under Rules 26 through 37 {and 45}] to aid [more detailed pleading][amendment of the pleading]."

H. Rule 27.1: Discovery in Aid of Pleading

Discovery in aid of pleading might be fit into Rule 26, but Rule 26 is already too long. It could be fit into present Rule 27, but perpetuation of testimony is a distinct problem and drafting would likely be more complicated. A new Rule 27.1 may be the simplest approach.

The first question will be whether to provide for discovery before filing an action. There are several state-law models. In addition, the ACTL/IAALS Pilot Project Rules include a detailed provision, set out in the Appendix, that provides a helpful illustration. The most persuasive reason to move in this direction may involve the plaintiff who does not know the identity of the defendant—which officer in a large police department shot the plaintiff's decedent? Which company made the exploding dynamite cap? Discovery could be limited by requiring showings that the plaintiff has exhausted reasonable alternatives for finding the information, the plaintiff can state all elements of a claim apart from identifying the defendant, and there are good reasons to impose the burdens of discovery on the

person asked for the information. This possibility has been twice suggested during earlier rounds of discovery work, and was quickly rejected each time. It may not prove any more popular now, but reconsideration may be appropriate if elevated pleading requirements create a risk that valid claims will frequently be defeated for lack of access to information controlled by the defendant. (The ABA 21st Century Proposals would allow pre-complaint discovery only to determine the identity of the defendant.)

An alternative is to provide discovery in aid of framing a claim after an action is commenced by filing a complaint. Discovery might be made available by allowing the plaintiff to file an incomplete complaint, specifically designating items on which discovery will be sought to support better-informed pleading. The defendant could respond by providing information without waiting for discovery, by agreeing to discovery, or by opposing discovery for stated reasons. Or discovery might be provided only after a motion challenging the claim (or defense). This approach comes closest to something that might be fit into Rule 26, perhaps with a cross-reference in Rule 12: the point would be to emphasize the authority to limit discovery to specific matters needed to support "better" pleading.

The ABA proposals include:

> "The court may permit focused post-complaint discovery in those limited cases where, because of the nature of the case, the plaintiff does not have access to sufficient information to satisfy the" pleading standard.

Examples are antitrust cases and discrimination cases where intent is an element of the claim.

I. Initial Disclosure

Pleading and discovery may overlap in a different way. Early disclosure of facts might be accomplished immediately after the papers that are called "pleadings," by obligations of unilateral disclosure. This approach might address the concerns that underlie the *Twombly* and *Iqbal* decisions by providing a secure foundation for guiding or eliminating discovery, while reducing fears that evaluation of "plausibility" in light of "judicial experience and common sense" will devolve into poorly supported speculation about the "facts" that have been pleaded and the inferences that can be drawn from them.

The Duke Conference reflected competing views on present Rule 26(a)(1) initial disclosures. One view is that they are useless.

Another is that they are helpful. A third is that they could become useful if the more searching 1993 version were restored, requiring disclosure of information that a party hopes will not be used as well as information it may use.

J. Pleading in Response

It will be difficult to improve on the drafting of Rule 8(b) to meet the frequent complaints that defendants deny too much, too casually. Rule 8(b)(2) requires that a denial fairly respond to the substance of the allegation. Rule 8(b)(3) requires that a party that does not intend to deny all allegations "must either specifically deny designated allegations or generally deny all except those specifically admitted." Rule 8(b)(4) requires that a party admit the part of an allegation that is true and deny the rest. If a true fact is pleaded with characterizations, adverbs, or adjectives, the answer must admit the fact even while denying the characterization, adverbs, or adjectives. Rule 11 enforces this duty; indeed the safe-harbor provision, 11(c)(2), specifically includes defenses and denials. The safe harbor may make it difficult to make much use of Rule 11 in this context, but amendment of Rule 11 may not be a satisfactory approach.

Defendants defend their practices by arguing that plaintiffs cause the problem by overpleading and by violating the separate-statement requirement of Rule 10(b). In effect, they assert it is unfair to impose on defendants the work of picking through the mess made by sloppy pleading. Again, it will be difficult to draft a satisfactory rule to promote clearer pleading. Anything done to perpetuate the *Twombly* and *Iqbal* decisions may actually make this problem more difficult.

So: Is there anything reasonable to be done? One comment in the ABA survey suggested whatever Rule 8(a) requires, good fact pleading could be useful as a request for admissions, and laments that defendants do not respond as Rule 8(b) requires. That sounds good. But is it possible to get there?

K. Pleading Affirmative Defenses

Plaintiffs complain that defendants thoughtlessly add long lists of affirmative defenses to their answers, providing nothing more than the words that identify the theory. Something more could be required.

Two examples from present Rule 8(c) illustrate the range of pleading possibilities. A defendant may plead comparative negligence—is there any reason to require greater detail than we

require of a plaintiff pleading negligence? Or a defendant may plead laches—should it not have to plead something to support the elements of unreasonable delay and actual prejudice in defending?

The range of desirable pleading practices may not be as broad as it is for complaints, but it is not much narrower. If anything is to be done, it may be better to avoid any attempt to provide specific pleading directions for specific affirmative defenses. There are far too many affirmative defenses, most of them not listed in Rule 8(c).

One illustration can invoke all of the possible variations in [re]drafting Rule 8(a)(2):

> "In responding to a pleading, a party must ~~affirmatively~~ state *in short and plain terms* any avoidance or affirmative defense . . . ."

CONCLUSION

The sketches set out in Part IV provide an incomplete overview of the many questions that flow from the *Twombly* and *Iqbal* opinions. Measuring the height of the pleading thresholds that emerge from lower-court development will be challenging in itself. No yardstick or thermometer exists to calibrate precise scales of pleading precision. Impressionistic assessments will be made, but they will vary with the perspectives of the assessors. And it seems unlikely that thresholds will be set at the same height across the wide range of substantive claims that come before the federal courts. But it remains possible to make rough measurements. The most likely guess is that pleading thresholds will be raised, at least for many categories of actions.

Then the hard work begins. Raising pleading standards may be good, bad, or neutral. "Bad" may mean standards that are too high or not yet high enough. Any rules prescription will depend on the diagnosis and no diagnosis can be certain. But certainty is not required in the rules business. Serious problems demand attention, and get it. Pleading problems can be addressed directly by pleading rules. They also can be addressed by new modes of integrating pleading with opportunities for discovery. Summary judgment also might be integrated more closely with pleading and discovery practice, facilitating access to vital sources of information while protecting against the burdens of full-blown discovery before an early determination whether the action should proceed to the stage of full discovery and beyond. The Civil Rules Committee can properly take

up arms in response to Professor Miller's call.[73] It remains to be decided whether, armed, the Committee should engage in combat.

[73] *See supra* note 8.

APPENDIX

ACTL/IAALS Pilot Project Rules[74]

Rule Three: Precomplaint Discovery

3.1 On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that:

a. the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by the discovery;

b. the moving party has probable cause to believe that the information sought by the discovery will enable preparation of a legally sufficient complaint;

c. the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought;

d. the proposed discovery is narrowly tailored to minimize expense and inconvenience; and

e. the moving party's need for the discovery outweighs the burden and expense to other persons and entities.

3.2 The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR 3.1. Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.

3.3 If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of discovery.

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[74] IAALS, *supra* note 65, at 4.